Muhammad Nur Aizzat bin Mohd Yunos v Amir Hamzah bin Abd Razak & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-04(W)-214–05 OF 2021
HAS ZANAH MEHAT, SEE MEE CHUN AND LIM CHONG FONG JJCA
4 APRIL 2023

Tort — Road accident — Liability — Appellant and first respondent involved in road accident — Parties submitted two different versions of accident — Appellant and first respondent submitted appellant's version of accident and second respondent submitted respondents' version of accident — Sessions court judge accepted respondents' version of accident — Judicial commissioner affirmed sessions court judge's decision — Whether witnesses were assessed and evaluated accordingly — Whether statutory declarations of second respondent's witnesses should have been excluded pursuant to s 73A of the Evidence Act 1950 — Whether respondents' version should have been excluded pursuant to s 153 of the Evidence Act 1950 — Whether fraud was established to exclude liability of insurer of vehicle — Whether sessions court judge erred in preferring respondents' version — Whether judicial commissioner erred in affirming decision of sessions court judge — Evidence Act 1950 ss 73A & 153

This was an appeal against the decision of the learned judicial commissioner ('the JC') in affirming the decision of the learned sessions court judge ('the SCJ') who had dismissed the appellant's claim against the first and the second respondents for injuries sustained in a road accident involving the appellant who had ridden his motorcycle and the first respondent who had ridden the second respondent's motorcycle. At first, both the parties had the same version of the accident, that was, the first respondent was riding from the opposite direction of the appellant and had suddenly cut across the appellant's path to turn into the junction on the appellant's left. Both the appellant and first defendant maintained that the accident involved only the two motorcycles and had occurred opposite a mosque ('the appellant's version'). The appellant's version was supported by the police sketch of the collision scene. However, based on an investigation conducted by the loss adjustor appointed by the insurance company that insured the second respondent's motorcycle ('the third respondent'), the loss adjustor found that the appellant's claim was fraudulently made. Consequently, the second respondent decided to amend his defence with a different version of story, that was, the first respondent had ridden the motorcycle without his permission, and that the accident had occurred near a bridge which was 1km away from the location indicated in the appellant's version. The second respondent also argued that there was, in fact,

a third vehicle involved in the accident, namely a motorcycle ridden by Farhan, and that both the appellant and Farhan had collided into the first respondent ('the respondents' version'). The respondents' version was supported by the testimonies and statutory declarations from Syabil, Farhan and Sharuf ('the SDs') and also the medical report of Farhan's injuries. The appellant submitted that the JC was wrong in affirming the decision of the SCJ particularly in preferring the respondents' version instead of the appellant's version.

Held, dismissing the appeal with costs of RM10,000 for the third respondent and no order as to costs for the second respondent:

(1) The JC had properly and correctly accepted the findings of the SCJ that the appellant's version had been contradicted and impugned by the respondents' version which was supported by independent evidence produced by the second and third respondents. It was thus justified that the learned JC accepted the respondents' version. The SCJ and JC had adequately evaluated the evidence adduced by the parties in entirety. It was plain here that the relevant findings of fact were made based substantially on the oral testimony of witnesses and it was trite that the appellate court did not interfere with the findings of the trier of fact who had enjoyed the audio-visual advantage of the witnesses particularly on their credibility and believability (see paras 32–33).

(2) The sessions court and the High Court had properly tested the oral testimonies of the witnesses against the pleadings, documentary evidence, conduct of the parties and overall probabilities of the entire case. The court found that the unchallenged contemporaneous medical report of Farhan's injuries corroborated the respondents' version in contrast with the police sketch of the collision scene that supported the appellant's version. The police sketch was only made several weeks subsequent to the occurrence of the collision based on the appellant's police report and the police did not investigate the subsequent reported respondents' version. The medical report was obviously weightier than the police sketch. This was also explanatory as to why the appellant did not plead the exact scene of the collision in his pleadings (see para 34).

(3) The court found that the appellant was motivated to defraud the third respondent for his own pecuniary benefit by advancing the false appellant's version in cahoots with the first respondent. In the circumstances, the appellant failed to rebut beyond a bare denial when he was accorded the opportunity to discredit the respondents' version. The inconsistent and improbable shifty account of the collision in support of the appellant's version as testified by the first respondent did not assist the appellant as well. The first respondent was also compromised by having made a false police report after his father and Syabil had entered a private settlement in relation to his action in riding the motorcycle without

permission and damaging it in the collision. The SCJ and JC were therefore had correctly found that the testimonies of Syabil, Farhan dan Sharuf were truthful and cogent because there was no motivation for them to give false evidence since there was nothing for them to gain. In the circumstances, there was no reason for the court to disturb the concurrent findings of fact made by the SCJ and JC in preferring the respondents' version (see paras 35–36).

(4) In relation to the admissibility of the police report and the SDs pursuant to s 73A of the Evidence Act 1950 ('the EA') which was raised for the first time in the High Court, the court found that Farhan and Syabil were not interested persons because there was no cogent evidence of real likelihood of bias on their part. The learned JC did not commit a misdirection when she found that they were only witnesses and not litigants to the proceedings. The court was also satisfied that they were only later discovered as identified by the third respondent's loss adjustor after the suit had already been initiated by the appellant. There was thus neither laches nor blameworthiness on the part of the second respondent (see para 37).

(5) In relation to the exclusion of the respondents' version by virtue of s 153 of the EA which was also raised for the first time by the appellant in the High Court, the court concurred with the learned JC that the evidence adduced here was for the purpose of proving the fact in issue but not in attack of the character/credit of the appellant and the first respondent. The provision was inapplicable and there was therefore no misdirection whatsoever by the learned JC. In totality, the court found that the appellant's appeal was not meritorious to warrant appellate intervention (see paras 38–39).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan pesuruhjaya kehakiman yang bijaksana ('PK') dalam mengesahkan keputusan hakim mahkamah sesyen yang bijaksana ('HMS') yang telah menolak tuntutan perayu terhadap responden pertama dan kedua untuk kecederaan yang dialami dalam kemalangan jalan raya yang melibatkan perayu yang telah menunggang motosikalnya dan responden pertama yang telah menunggang motosikal milik responden kedua. Pada mulanya, kedua-dua pihak mempunyai versi kemalangan yang sama, iaitu, responden pertama menunggang dari arah bertentangan perayu dan tiba-tiba memotong laluan perayu untuk membelok ke simpang di sebelah kiri perayu. Kedua-dua perayu dan defendan pertama menegaskan bahawa kemalangan tersebut hanya melibatkan dua motosikal tersebut dan telah berlaku bertentangan dengan sebuah masjid ('versi perayu'). Versi perayu disokong oleh lakaran tempat kejadian oleh polis. Bagaimanapun, berdasarkan siasatan yang dijalankan oleh penyelaras kerugian yang dilantik oleh syarikat insurans yang menginsuranskan motosikal responden kedua ('responden ketiga'),

penyelaras kerugian tersebut mendapati tuntutan perayu dibuat secara fraud. Akibatnya, responden kedua memutuskan untuk meminda pembelaannya dengan versi cerita yang berbeza, iaitu, responden pertama telah menunggang motosikal tanpa kebenarannya, dan bahawa kemalangan tersebut telah berlaku berhampiran jambatan yang jaraknya 1km dari lokasi yang ditunjukkan dalam versi perayu. Responden kedua juga berhujah bahawa sebenarnya terdapat kenderaan ketiga yang terlibat dalam kemalangan tersebut, iaitu sebuah motosikal yang ditunggangi oleh Farhan, dan kedua-dua perayu dan Farhan telah bertembung dengan responden pertama ('versi responden'). Versi responden disokong oleh keterangan dan akuan berkanun daripada Syabil, Farhan dan Sharuf ('AB tersebut') dan juga laporan perubatan kecederaan Farhan. Perayu berhujah bahawa PK terkhilaf dalam mengesahkan keputusan HMS terutamanya dalam memilih versi responden berbanding versi perayu.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000 diberikan kepada responden ketiga dan tiada perintah berkaitan kos untuk responden kedua:

(1) Pesuruhjaya kehakiman telah dengan tepat dan betul menerima dapatan-dapatan HMS bahawa versi perayu telah dicanggah dan disangkal oleh versi responden yang disokong oleh keterangan bebas yang dikemukakan oleh responden kedua dan ketiga. Oleh itu adalah wajar bagi PK yang bijaksana menerima versi responden. Hakim mahkamah sesyen dan PK telah menilai dengan secukupnya keterangan yang dikemukakan oleh pihak-pihak secara keseluruhan. Jelas di sini bahawa dapatan-dapatan fakta yang berkaitan dibuat berdasarkan keterangan lisan saksi-saksi dan sudah menjadi undang-undang yang mantap bahawa mahkamah rayuan tidak mengganggu dapatan-dapatan pembicara fakta yang telah menikmati kelebihan audio-visual saksi-saksi terutamanya mengenai kredibiliti dan kebolehpercayaan mereka (lihat perenggan 32–33).

(2) Mahkamah sesyen dan Mahkamah Tinggi telah menguji dengan betul keterangan lisan saksi-saksi terhadap pliding, keterangan dokumentari, kelakuan pihak-pihak dan semua kebarangkalian bagi keseluruhan kes. Mahkamah mendapati bahawa laporan perubatan kontemporari yang tidak dicabar mengenai kecederaan Farhan menyokong versi responden berbanding dengan lakaran tempat perlanggaran oleh polis yang menyokong versi perayu. Lakaran polis hanya dibuat beberapa minggu selepas berlakunya perlanggaran tersebut berdasarkan laporan polis perayu dan polis tidak menyiasat versi responden yang dilaporkan berikutnya. Laporan perubatan tersebut jelas mempunyai lebih pemberatan daripada lakaran polis tersebut. Ini juga menjelaskan mengapa perayu tidak memplid tempat kejadian sebenar bagi perlanggaran tersebut dalam plidingnya (lihat perenggan 34).

(3) Mahkamah mendapati perayu mempunyai motif untuk menipu responden ketiga bagi mendapatkan faedah kewangan untuk dirinya sendiri dengan mengemukakan versi perayu yang palsu dalam pakatannya dengan responden pertama. Dalam keadaan tersebut, perayu gagal untuk mematahkan melampaui penafian semata-mata apabila dia diberi peluang untuk mematahkan versi responden. Pendirian yang tidak konsisten dan tidak berkemungkinan mengenai perlanggaran tersebut yang menyokong versi perayu seperti yang dikemukakan oleh responden pertama juga tidak membantu perayu. Responden pertama turut dikompromi apabila membuat laporan polis palsu selepas bapanya dan Syabil memasuki perjanjian penyelesaian persendirian berhubung tindakannya menunggang motosikal tersebut tanpa kebenaran dan merosakkannya dalam perlanggaran tersebut. Oleh itu, HMS dan PK telah membuat dapatan yang betul bahawa keterangan Syabil, Farhan dan Sharuf adalah benar dan kukuh kerana mereka tiada motif untuk memberikan keterangan palsu kerana tiada apa yang mereka perolehi. Dalam keadaan tersebut, tiada sebab untuk mahkamah mengganggu dapatan-dapatan fakta yang sama yang dibuat oleh HMS dan PK dalam memilih versi responden (lihat perenggan 35–36).

(4) Berhubung dengan kebolehterimaan laporan polis dan AB tersebut menurut s 73A Akta Keterangan 1950 ('AK') yang pertama kali dibangkitkan di Mahkamah Tinggi, mahkamah mendapati Farhan dan Syabil bukanlah orang yang berkepentingan kerana tidak ada keterangan yang kukuh tentang kemungkinan nyata berat sebelah di pihak mereka. Pesuruhjaya kehakiman yang bijaksana tidak melakukan salah arah apabila mendapati mereka hanya saksi-saksi dan bukan litigan kepada prosiding. Mahkamah juga berpuas hati bahawa mereka hanya ditemui oleh penyelaras kerugian responden ketiga selepas saman tersebut telah dimulakan oleh perayu. Oleh itu, tidak ada kelewatan mahupun kesalahan di pihak responden kedua (lihat perenggan 37).

(5) Berhubung dengan pengecualian versi responden berdasarkan s 153 AK yang juga dibangkitkan buat pertama kali oleh perayu di Mahkamah Tinggi, mahkamah bersetuju dengan PK yang bijaksana bahawa keterangan yang dikemukakan di sini adalah bagi tujuan membuktikan fakta dalam isu tetapi bukan untuk menyerang watak/kredit perayu dan responden pertama. Peruntukan tersebut tidak terpakai dan oleh itu tiada apa-apa salah arah oleh PK yang bijaksana. Secara keseluruhannya, mahkamah mendapati bahawa rayuan perayu tidak bermerit untuk mewajarkan campur tangan rayuan (lihat perenggan 38–39).]

Cases referred to

Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 CLJ 1, FC (refd)

Bearmans Ltd and Another v Metropolitan Police District Receiver [1961] 1 All ER 384, CA (refd)
Brunsfield Construction Sdn Bhd v LDE Aluminium Industries Sdn Bhd [2019] 6 MLJ 784, CA (refd)
Chong Keow v Shaari Yaacob [1988] 1 CLJ Rep 463, HC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (folld)
Lim Chor Ching & Ors v Idris Abdul Karim & another appeal [1998] MLJU 666; [1998] 3 CLJ Supp 145, HC (refd)
Ong Kong Beng & Anor v Ong Kong Leong & Ors [2022] 3 MLJ 536; [2021] MLRAU 262, CA (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 CLJ 215, HC (refd)

Legislation referred to

Evidence Act 1950 ss 73A, 73A(5), 153

Appeal from: *Muhammad Nur Aizzat bin Mohd Yunos v Amir Hamzah bin Abd Razak & Anor (Pacific & Orient Insurance Co Bhd, intervener)* [2023] 9 MLJ 197 (High Court, Johor Bahru)

Jayabalan a/l Raman Kutty (with Ragunath a/l Sivalingam and Christopher Tan) (Kamaruddin & Partners) for the appellant.
Lee Sooi Kee (SK Lee) for the second respondent.
R Kamalanathan (with Vinod Kamalanathan and Anis Amira) (Vinod Kamalanathan & Assoc) for the third respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court that affirmed the trial decision of the sessions court in relation to a motorcycle accident.

[2] We have on 3 April 2023 unanimously also dismissed the appeal with costs of RM10,000 for third respondent and no order as to costs for the second respondent.

[3] The appellant is an individual and rider of motorcycle No ACM 3009 who is the plaintiff in the sessions court.

[4] The first respondent is an individual and rider of motorcycle No JBG 4669 owned by the second respondent who is also an individual. Both the first

respondent and second respondent are the first defendant and second defendant in the sessions court respectively.

[5] The third respondent is a limited company listed in Bursa Malaysia and a Malaysian general insurer that insured the motorcycle No JBG 4669 owned by the second respondent The third respondent is the intervener in the sessions court.

BRIEF BACKGROUND

[6] The appellant on 23 March 2017 whilst riding motorcycle No ACM 3009 encountered a collision with another motorcycle No JBG 4669 at 12.30am at Kulai, near the Sedenak toll in Johor. He was admitted to the Kulai Hospital and thereafter transferred to the Hospital Sutanah Aminah Johor Bahru for crush injury of his right foot as well as fractured right tibia and fibula. As the result, his right leg was amputated below knee.

[7] The appellant lodged his police report on 19 April 2017.

[8] The first respondent lodged his police report on 20 April 2017 and on third May 2017 paid the traffic fine for causing the collision.

[9] The appellant on 10 August 2018 instituted the suit in the sessions court.

IN THE SESSIONS COURT

[10] In the suit, the appellant's version of the collision is that he was riding motorcycle No ACM 3009 proceeding from the direction of Ayer Baloi towards the Sedenak toll near the mosque when the first respondent who was riding motorcycle No JBG 4669 came from his opposite direction suddenly and without warning entered into the junction on his left at Jalan Pekeliling. As the result, the first respondent cut across the appellant's path and collided with him ('appellant's version').

[11] The first and second respondents on 27 September 2018 through their solicitors Messrs SK Lee filed a common defence admitting to the collision but denied liability.

[12] The trial commenced on 24 April 2019 and the appellant called several witnesses that included the police investigating officer, orthotist and himself.

[13] The appellant closed his case on 25 April 2019 and the first and second respondents thereafter called the prosthetics vendor as their first witness.

[14] However on 27 June 2019, Messrs SK Lee applied to be discharged from acting for the first respondent and amend the second respondent's defence because the loss adjustor appointed by the third respondent discovered that the appellant's claim was fraudulently made.

[15] The third respondent therefore also intervened in the suit on 3 September 2019.

[16] The second respondent on 23 October 2019 in his amended defence denied the appellant's version of the collision and pleaded a differing version of the collision that involved a third motorcycle too. According to the second respondent, the collision occurred about 1km away at Jalan Baloi Parit Panjang along the straight road (without junction) near a bridge. The appellant was riding on motorcycle No ACM 3009 came from the opposite direction and collided with the first respondent who was riding on motorcycle No JBG 4669. By reason of the first respondent and his friend, Farhan who was riding motorcycle No JDR 9007 in close proximity, Farhan could not avoid the collision and also collided on to the motorcycle No JBG 4669 ridden by the first respondent. As the result, Farhan fractured his shoulder and was admitted to the Kulai hospital on the same night ('respondents' version'). The second respondent also pleaded that the appellant made a fraud claim in collusion with the first respondent and that the second respondent did not give permission for the first respondent to use the motorcycle No JBG 4669.

[17] Subsequently the third respondent on first November 2019 filed a defence similar to the amended defence filed by the second respondent.

[18] The trial resumed on 18 November 2019 and 26 November 2019 and the second respondent called his witnesses including himself, several of his friends Syabil, Farhan and Sharuf as well as the loss adjustor, Rahimy.

[19] On 17 December 2019, the sessions court judge allowed the recall of the appellant's witnesses, to wit, himself and the police investigating officer. The unrepresented first respondent also called his witnesses, to wit, himself and his father, Razak.

[20] The learned sessions court judge on 8 March 2020 dismissed the appellant's claim with costs. He found, inter alia, that the respondent's version is more probable and the appellant's claim was fraudulently made correct scene of the accident.

A IN THE HIGH COURT

[21] The appellant on 16 March 2020 appealed to the High Court against the decision of the sessions court on dismissal of the liability of the first and second respondents.

B

[22] After hearing submissions of the parties, the learned judicial commissioner and RM10,000 to the third respondent/intervener.

C **[23]** The learned judicial commissioner found that the learned sessions court judge did not fail to judicially appreciate the evidence adduced before her in disregarding the appellant's version since there were more discrepancies in the evidence adduced by the appellant and first respondent. In particular, the learned judicial commissioner found that their evidence on the scene of the accident and number of the vehicles involved were contradicted by Farhan who has been corroborated by Syabil and Sharuf. They were in the company of the first respondent before he rode off on the second respondent's motorcycle.

D

[24] Furthermore, the learned judicial commissioner found that the E appellant merely denied the respondents' version and the involvement of Farhan in the accident. The appellant's version has been contradicted by the independent evidence produced by the second respondent's witnesses as well as the medical report pertaining to the injuries sustained by Farhan which was unchallenged by the appellant. Although the police investigating officer had F issued a summons to the first respondent, the learned judicial commissioner concurred with the learned sessions court judge's finding that the investigation could not be relied on as it was inaccurate and incomplete without the respondents' version considered in the investigation.

G **[25]** The learned judicial commissioner referred and relied on the case of *Chong Keow v Shaari Yaacob* [1988] 1 CLJ Rep 463 wherein Lim Beng Choon J held as follows:

> The existence of two conflicting versions of how an accident occurred (as it happens here) is typical in almost all motor vehicle accident cases. In such a situation, I will H have to carry out a searching evaluation and assessment of the totality of the oral evidence and also to resort to the documentary evidence in order to find out the truth. In my attempt to uncover the truth in order to arrive at a just decision, I must not lose sight of the principle that in assessing the evidence of the parties in a suit, it is not merely a question of whom to believe but rather whose version is more inherently probable which is the prime consideration. I

and concluded that the learned sessions court judge had duly weighed and evaluated all the evidence by the witnesses including their credibility and ultimately found that the appellant failed to prove his case because his version is inherently not probable.

[26] Moreover, the learned judicial commissioner found that there was suppression of material facts by both the appellant and first respondent in making the first respondent liable to enable the appellant to receive maximum benefit of the insurance coverage of the third respondent. This was the appellant's motive in view of the severity of his injuries suffered. As the result, the learned judicial commissioner found that the concealment of the truth amounted to fraud; hence the third respondent could not be liable in light of such fraudulent claim.

FINDINGS OF THIS COURT

[27] The appellant strenuously submitted to persuade us that the High Court was wrong in affirming the decision of the sessions court particularly in preferring the respondents' version instead of the appellant's version.

[28] These concern findings of fact.

[29] We have therefore, in the exercise of our apex appellate function here, reviewed not only the decision of the High Court but also the decision of the sessions court since they are concurrent findings.

[30] In this respect, we are guided by the decision of this court in the dicta of Gopal Sri Ram JCA (later FCJ) in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 as follows:

> *A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case, A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.* There are a number of important and leading cases in which the point has been considered.
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> ...
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> In *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165; [1984] 1 LNS 40, the trial judge had arrived at a findings of facts based purely on the credibility of the witnesses he had seen and heard. The Court of Appeal of Singapore reversed his finding. On further appeal to the Privy Council the judgment of the Court of Appeal was upheld Lord Roskill said (at p 168):
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> Their Lordships do not find it surprising that the Court of Appeal not only felt

obliged to reach the conclusion which they expressed orally at the conclusion of the hearing of the appeal that the learned judge's findings on the issue favourable to the appellant could not be supported, and that that court must reverse the learned judge's judgment and enter judgment for the respondents, but that in their written judgment they should have said that in basing his finding 'entirely on the credibility or otherwise of the witnesses testifying before him' the learned judge was guilty of 'a plain misdirection'. Their Lordships respectfully agree with the Court of Appeal that the findings favourable to the appellant were arrived at 'without an adequate scrutiny and consideration of all the evidence before him.

Their Lordships are well aware, as no doubt were the Court of Appeal, of the limited circumstances in which it is open to an appellate court to reverse the findings of a trial judge based on credibility of the witnesses who have given evidence at the trial. But when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and, in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of an appellate court to intervene and correct the error lest otherwise that error results in serious injustice.

In *Armagas Ltd v Mundogas SA ('The Ocean Frost')* [1985] 1 LIR 1, the English Court of Appeal reversed a finding of fraud made by the trial judge in that case on the ground that there had been no judicial appreciation of the evidence. Robert Goff LJ (later Lord Goff of Chieveley) said (at p 57):

Furthermore it is implicit in the statement of *Lord MacMiilan in Powell v Streatham Manor Nursing Home* [1935] AC 243, at p 256 that the probabilities and possibilities of the case may be such as to impel an appellate court to depart from the opinion of the trial judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth, I have been driven to the conclusion that the judge did not pay sufficient regard to these matters in making his findings of fact in the present case. (Emphasis added.)

Which has been referred and accepted by the Federal Court in *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1.

[31] We noted in another recent decision of this court in *Brunsfield Construction Sdn Bhd v LDE Aluminium Industries Sdn Bhd* [2019] 6 MLJ 784, Mary Lim Thiam Suan JCA (now FCA) held as follows:

[16] It is the duty of the trial court to evaluate evidence led, in particular, consider the oral testimonies against any documentary evidence produced by either party;

give proper weightage to all evidence, and explain why certain pieces are discarded or have overall bearing and value. It is not enough to say that there has been a close and careful examination of all the evidence presented but offer no explanation or reasoning on that evaluation save to deal with the issues for determination from just a point of pleading.

[32] Upon our review, we find the learned judicial commissioner has appellant's version has been by contradicted and impugned by the respondents' version which is supported by independent evidence produced by the second and third respondents as summarised in paras [23]–[24] above. It is thus justified that the learned judicial commissioner accepted the respondent's version.

[33] We are satisfied that the sessions court and subsequently the High Court on appeal have adequately evaluated the evidence adduced by the parties in entirety. It is plain here that the relevant findings of fact were made based substantially on the oral testimony of witnesses and it is trite that we do not interfere with the findings of the trier of fact who has enjoyed the audio-visual advantage of the witnesses particularly on their credibility and believability.

[34] That notwithstanding, we find that the sessions court and High Court have also properly tested the oral testimonies of witnesses against the pleadings, documentary evidence, conduct of the parties and overall probabilities of the entire case following the decision of this court in *Ong Kong Beng & Anor v Ong Kong Leong & Ors* [2022] 3 MLJ 536; [2021] MLRAU 262. It is pertinent to us that the unchallenged contemporaneous medical report of Farhan's injuries corroborated the respondents' version in contrast with the police sketch of the collision scene that supported the appellant's version. The police sketch was only made several weeks subsequent to the occurrence of the collision based on the appellant's police report after his discharge from hospital. He did not investigate the subsequent reported respondents' version too. The former is obviously weightier compared to the latter. This is also explanatory as to why the appellant did not plead the exact scene of the collision in his pleadings.

[35] We are also convinced that the appellant was motivated to defraud the third respondent for his own pecuniary benefit by advancing the false appellant's version in cahoots with the first respondent. In the circumstances, he was unable to rebut beyond a bare denial when he was accorded the opportunity to discredit the respondents' version. The inconsistent and improbable shifty account of the collision in support of the appellant's version as testified by the first respondent did not assist the appellant as well. Additionally, the first respondent is compromised by having made false police report consequential to the private settlement made between his father, Razak and Syabil for riding the motorcycle No JBG 4669 without permission and

damaging it in the collision. The sessions court and High Court therefore correctly found that the testimonies of Syabil, Farhan and Sharuf are truthful and cogent because there was no motivation for them to give false evidence by reason there was nothing for them to gain and all persons involved were from the same village.

[36] In the circumstances, there is no reason for us to disturb the concurrent findings of fact made by the sessions court and High Court in preferring the respondents' version. The findings are in our view properly made relying on the case of *Lim Chor Ching & Ors v Idris Abdul Karim & another appeal* [1998] MLJU 666; [1998] 3 CLJ Supp 145 that the appellant's version is inherently improbable and hence not proved.

[37] For completeness, we will briefly deal with the admissibility of the police reports and statutory declarations of the Second respondent, Farhan and Syabil pursuant to s 73A of the Evidence Act 1950 ('the Act') raised for the first time in the High Court by the appellant that they are interested persons and hence excluded by virtue of s 73A(5) of the Act. We however find that Farhan and Syabil are not interested persons because there is no cogent evidence of real likelihood of bias on their part following the English Court of Appeal case of *Bearmans Ltd and Another v Metropolitan Police District Receiver* [1961] 1 All ER 384. The learned judicial commissioner did not commit a misdirection when she found that they were only witnesses and not litigants to the proceedings. We are also satisfied that they were only later discovered as identified by the third respondent's loss adjustor after the suit has already been initiated by the appellant. There is thus neither laches nor blameworthiness on the part of the second respondent here.

[38] Moreover as to the exclusion of the respondent's version by virtue of s 153 of the Act raised also for the first time by the appellant in the High Court, we concur with the finding of learned judicial commissioner that the evidence adduced here is for purpose of proving the fact in issue but not in attack of the character/credit of the appellant and first respondent following *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215. The provision is inapplicable and there is therefore no misdirection by the learned judicial commissioner whatsoever.

[39] In the circumstances, we find that the appellant's appeal is not meritorious to warrant appellate intervention.

CONCLUSION

[40] It is for the foregoing reasons that we dismissed the appeal as so ordered.

Appeal dismissed with costs of RM10,000 for the third respondent and no order as to costs for the second respondent.

Reported by Dzulqarnain Ab Fatar